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No. 93-319

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

STEPHEN P. RASCH,

Petitioner,

vs.

NATIONAL RAILROAD PASSENGER CORPORATION,
D/B/A AMTRAK,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

REPLY BRIEF OF PETITIONER

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Amtrak's arguments and case citations, taken together with the Petition for Writ of Certiorari, reveal the correctness of one commentator's statement in discussing *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977):

> The Supreme Court interpreted the accommodation requirement in 1977 in *Trans World Airlines v. Hardison*, but in the subsequent decisions no uniformity has yet

> emerged. An examination of the cases since 1977 suggests that courts typically use one of three different models of interest balancing to analyze the varied factual contexts in which religious accommodation issues are presented.

Note, *Heaven Can Wait: Judicial Interpretation of Title VII's Religious Accommodation Requirement Since Trans World Airlines v. Hardison*, 53 Fordham L. Rev. 839, 840 (1985). The same writer further observed that "far from resolving the lower courts' confusion as to the meaning of section 2000e(j)'s accommodation requirement, the Supreme Court's language in *Hardison* has been the foundation for highly divergent applications of the statute." *Id.* at 847-48.

Amtrak's opposition only serves to further highlight the importance of this case in Title VII religious accommodation jurisprudence and illustrates why this Court should grant certiorari. Amtrak, like some courts, has found all provisions of a labor contract -- not just a seniority provision -- impervious to religious accommodation matters; has concluded that *Hardison* proscribes both mandatory and voluntary job swaps contrary to the EEOC Guidelines; and concludes that an employer need not even explore transferring an employee to a different job for accommodation purposes. Amtrak and the lower courts in this case have such a shallow view of the religious accommodation provisions of Title VII that virtually no accommodation duty would be imposed on an employer under such an interpretation. The difference between the various courts' approaches and analyses is the only logical explanation for the differences in the results in many religious accommodation cases.

1. Amtrak erroneously asserts that *Hardison* emphasizes that an employer cannot be forced under Title VII

to violate a collective bargaining agreement in the name of religious accommodation (Resp. Brf. at 7). It is this claimed invincibility of the whole collective bargaining agreement that forms the basis of Amtrak's assertion that it need not even consider using voluntary substitutes as a means of accommodation, even though Rasch had found a volunteer who offered to work his Sabbath for him (A 213, 221-22).

Many circuits have ruled that it is only the seniority provision of a collective bargaining agreement that is removed from a Title VII religious accommodation claim. In *Nottelson v. Smith Steel Wkrs. D.A.L.U. 19806*, 643 F.2d 445, 452 (7th Cir. 1981), *cert. denied*, 454 U.S. 1046 (1981), the court stated "that Title VII rights cannot be bargained away and that a collective bargaining agreement therefore does not of itself provide a defense for Title VII violations." In *McDaniel v. Essex Int'l, Inc.*, 696 F.2d 34, 37 (6th Cir. 1982), the court held that Title VII required a union to waive a union security clause in order to accommodate an employee who held religious views against the payment of union dues. Every circuit that has ruled on this issue has held that a collective bargaining agreement must give way to such a Title VII accommodation. *See also Cooper v. General Dynamics*, 533 F.2d 163 (5th Cir. 1976), *cert. denied sub nom International Ass'n of Machinists and Aerospace Workers v. Hopkins*, 433 U.S. 908 (1977); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239 (9th Cir. 1981), *cert. denied*, 454 U.S. 1098 (1981).

This Court in *Hardison* did observe that section 703(h) (42 U.S.C. § 2000e-2(h)) affords special treatment for seniority systems. 432 U.S. at 81-82. The Court stated that "absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences." *Id.* at 82. Of course, this is not tantamount to saying that Title VII exempts

employers from their statutory obligation to accommodate an employee's religious practices where there is a bona fide seniority system in place since there may well be -- as there was in the instant case -- other means to accommodate without violating seniority.

Amtrak interchangeably refers to seniority and a collective bargaining contract without distinguishing between the two. This is obviously because Amtrak had to base its defense on general contract language rather than a seniority proviso. Seniority simply is not involved in determining the order of assignment for employees on Amtrak's Extra Board. Amtrak argues that the UTU Agreement specifies the order in which employees are to be called on the Extra Board, and provides for penalty payments to employees who are called out of their seniority order (Resp. Brf. at 12). The relevant provision of the collective bargaining agreement concerning Extra Board assignments, however, states:

> Extra employees will be called first in, first out, as registered on the extra board.

Rule 12(a) of Amtrak's contract with UTU (A 67).

Thus, Amtrak is dead wrong in suggesting that employees working on the Extra Board are to be called in the order of their seniority. Seniority, and the protection afforded seniority by section 703(h), is totally irrelevant to the question of whether a voluntary substitution is a viable accommodation. Permitting A. L. Boyd to work in Rasch's place would not have violated any seniority provision of the collective bargaining agreement. More importantly, permitting Boyd to work in Rasch's place in no way resulted in denying other

employees' their shift and job preferences.[1]

The provision in the contract as to payment states:

> Extra employees who are not called in their turn will be paid the greater of either what they actually earned or the earnings of the assignment(s) they should have been called for, and will retain their place on the extra board.

Rule 12(1) of UTU Contract (A 68).

Even if Boyd worked in Rasch's place, the Extra Board employees would still be "called in their turn." Thus, the substitution accommodation would not have resulted in any extra cost to Amtrak.

Further, both Amtrak and the union had an affirmative responsibility under Title VII to render whatever assistance they might be called upon to give in attempting to work out an accommodation. *Robinson v. Lorillard Corp.*, 444 F.2d 791, 799 (4th Cir. 1971); *Macklin v. Spector Freight Sys., Inc.*, 478 F.2d 979, 989 (D.C. Cir. 1973); *Glus v. G.C. Murphy Co.*, 329 F. Supp. 563, 567 (W.D. Pa. 1971).

An employer such as Amtrak had the affirmative responsibility to explore union cooperation in solving the

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[1]The evidence demonstrates that there was no rigid application of the Extra Board assignments. James Maguire, one of Rasch's supervisors, testified that it is common practice for people on the Extra Board to call up and say "mark me off," and the crew dispatcher will let them off without any further explanation (A 347). Supervisory personnel at Amtrak were, however, instructed to treat Rasch's religious requests differently and specifically instructed the crew callers not to permit Rasch to be excused from work during his Sabbath (A 446-47, 453-55).

accommodation requirements which affected both the employer and the union. *Boomsma v. Greyhound Food Mgmt.*, 639 F. Supp. 1448, 1455 (W.D. Mich. 1986). In *EEOC v. Arlington Transit Mix, Inc.*, 957 F.2d 219, 222 (6th Cir. 1991), the court of appeals rejected the district court's determination that the existence of a seniority system exempted the employer from its accommodation duty. Noting that one of the mechanics testified that he would have exchanged shifts with the employee needing the religious accommodation, the court held that "[a]t a minimum, Arlington had an obligation to explore a voluntary waiver of seniority rights before terminating Taylor." *EEOC v. Arlington Transit Mix, Inc.*, 957 F.2d at 222.

The courts below in the instant case, unlike the Sixth Circuit, ended their inquiry upon concluding that the collective bargaining agreement provided for the order of assignment on the Extra Board. But as the court stated in *Shaffield v. Northrop Worldwide Aircraft Serv., Inc.*, 373 F. Supp. 937, 942 (M.D. Ala. 1974), even if a seniority provision of a collective bargaining agreement would prevent voluntary trading, "it may well be that the company's burden includes seeking union consent to some form of variance." There was no showing in this case that the union would have objected to a voluntary trade between Rasch and Boyd nor do the courts below -- or for that matter Amtrak -- explain why such a trade would have violated the seniority rights of other employees.

If, for example, a volunteer such as Boyd was willing to substitute for Rasch on the Extra Board with the understanding that he would be the last to be called in the event that another employee on the Extra Board desired to be called first, it is difficult to see how any Extra Board employee would have been adversely affected or would even object to such an arrangement.

2. Amtrak attempts to demonstrate that the Ninth Circuit's holding in *EEOC v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989), is not in conflict with the lower courts in this case, claiming that in *Hacienda* the labor contract did not require that work assignment be governed by seniority and that Hacienda had accommodated co-workers' requests for weekends off for nonreligious reasons citing a footnote in the court's opinion (Resp. Brf. at 12-13). But the factual amplification in the court's footnote clearly was not the central holding in *Hacienda*. And that court's analysis is at odds with the instant case, demonstrating the fundamental difference in the Ninth Circuit's interpretation of *Hardison* and its religious accommodation analysis from that of the courts below.

The court in *Hacienda*, after observing that a supervisor "admitted that she never asked any maid if they would volunteer to work," *Hacienda*, 881 F.2d at 1513, further noted that "[t]he record also reflects that there was a least one voluntary substitute . . . who was willing to work for her." *Id.* The court discussed the employer's reliance on *Hardison*, which argued that "like *TWA*, it was bound by its union contract to schedule employees on the basis of seniority and cannot, therefore, be held liable." *Id.*

The Ninth Circuit, unlike the courts below, concluded that the existence of a seniority system did not exempt the employer from its statutory duties to accommodate an employee's religious practices. As that court stated, "at a minimum, the employer was required to negotiate with the employee in an effort reasonably to accommodate the employee's religious beliefs." *Id.* The court observed that in *Hardison*, even with a bona fide seniority system in place, TWA "made several attempts to accommodate the religious practices of the plaintiff, including: . . . an authorized union search for someone who would exchange shifts, . . .and . . .

an effort to find another job in the company for the employee." *Id.*

In *Hacienda*, the court stated that "[o]nce the employee has established a prima facie case, the burden shifts to the employer to prove that it made good faith efforts to accommodate the employee's religious beliefs." *Id.* at 1512. According to the court, "[i]f the employer does not propose an accommodation, the employer must accept the employee's proposal or demonstrate that the proposal would cause the employer undue hardship." *Id.* In this case, Amtrak did not negotiate with Rasch, it made no accommodation proposal, and although Rasch proposed the use of a substitute, Amtrak did not show Rasch how the use of a substitute would result in undue hardship to Amtrak's business.[2]

3. As noted in the Petition for Writ of Certiorari, when Rasch was discharged on November 16, 1988, there was an assistant conductor's position at Salisbury, North Carolina, which would have accommodated his Sabbath requirements. (*See* Petition at 18-20.) Although arguably the union may not have been willing to agree to a long-term job swap arrangement, it may well have been agreeable to a temporary arrangement until Rasch completed a transfer to the Salisbury position.

Amtrak does not claim that it engaged in an active and

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[2]Amtrak claims Rasch made little effort to accommodate his own religious needs (Resp. Brf. at 3). This point is disputed. In fact, each time Rasch attempted to accommodate his needs, it was rejected by Amtrak (A 205-07, 213, 224). Although Rasch attempted to work out an accommodation for his religious needs, an employee has no duty to engage in bilateral cooperation until after the employer undertakes initial steps toward accommodation. *Toledo v. Nobel-Sysco., Inc.*, 892 F.2d 1481, 1489 (10th Cir. 1989). But Amtrak never took such steps.

Amtrak does not claim that it engaged in an active and bona fide effort to accommodate Rasch's religious needs or that Amtrak's conductors cannot be accommodated. It fails to even discuss the fact that there is credible evidence that at least one position that would have accommodated Rasch (the Salisbury, North Carolina, position) was available approximately one month before Rasch was fired. In fact, Amtrak does not deny that Rasch could have been transferred to the Salisbury position on October 9, 1988, when he returned to work from a three-week vacation.

Amtrak also does not deny that there were conceivably other positions available that would have accommodated Rasch if Amtrak had only investigated. And of course it does not and cannot deny that on summary judgment there was not a material issue of fact which should have foreclosed the entry of summary judgment on behalf of Amtrak. Amtrak's weak response is that "[g]iven the singular nature of the Amtrak Extra Board, which requires 24-hour a day, 7-day a week availability, there is simply no reason why Supreme Court review is warranted." (Resp. Brf. at 14).[3]

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[3]Amtrak erroneously states that a number of facts cited by petitioner, including Rasch's claim that Amtrak supervision told him to continue on the Extra Board, were never presented to the district court (Resp. Brf. at 6 n.4). This is simply false. (*See* A 685-88.) Amtrak also contends that "Petitioner began calling in sick frequently." (Resp. Brf. at 2). This was refuted at the trial court. According to supervisor Maguire, Rasch had not misinformed Amtrak and "was pretty straightforward." (A 344). It was the crew callers who "automatically put somebody down sick." There simply was no code the crew callers could use for marking off for religious reasons (A 344-45).

Amtrak contends that during Rasch's first 19 months he was absent about 123 days. This was calculated on the basis of a seven-day workweek and represents Rasch's refusal to work Friday night and Saturday before sunset. In fact, there were days Rasch actually worked

But Amtrak avoids the heart of Rasch's claim. A job transfer would avoid the claimed "singular nature" of the Extra Board. Rasch contends that if the Extra Board presented an accommodation problem for Amtrak, it was Amtrak's duty to explore availability of other positions such as the Salisbury position. Rather than allowing Rasch to amass absences on Friday nights and Saturdays, Amtrak should have sought to transfer him to another job assignment as the EEOC Guidelines on Religious Discrimination suggests, 29 C.F.R. § 1605.2(d)(1)(iii) (Pet. App. at 24a).

CONCLUSION

For the above-stated reasons, and for the reasons stated in the Petition for Writ of Certiorari, this Court should grant the Petition.

Dated: November 4, 1993 Respectfully submitted,

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but was charged as absent (A 396). Even so, from January 1 to November 16, 1988, Rasch spent 2280 hours on Amtrak trips which averages over 40 hours per week (A 200, 400, 449-50). Other employees who missed work were not even disciplined (A 399-400), but Rasch was penalized by being denied the 40-hour guarantee (A 438-39) and was subsequently fired.